# No. 11,756

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

---

THE ALASKA WORLD WAR II VETERANS' BOARD and ROBERT E. ELLIS, JOHN S. HELLENTHAL, JOHN M. CROSS, L. EMBERT DEMMERT and PAUL SOLKA, JR., members of said Board, and NORMAN HALEY, Executive officer of said Board,

*Appellants,*

vs.

TERRITORY OF ALASKA ex rel. OSCAR G. OLSON,

*Appellee.*

**On Appeal from the District Court for the Territory of Alaska, Division No. 1.**

## BRIEF FOR APPELLANTS.



---

FAULKNER & BANFIELD,
H. L. FAULKNER,
NORMAN C. BANFIELD,
Juneau, Alaska,
*Attorneys for Appellants.*

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

## Table of Authorities Cited

No. 11,756

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

---

THE ALASKA WORLD WAR II VETERANS' BOARD and ROBERT E. ELLIS, JOHN S. HELLENTHAL, JOHN M. CROSS, L. EMBERT DEMMERT and PAUL SOLKA, JR., members of said Board, and NORMAN HALEY, Executive officer of said Board,

*Appellants,*

vs.

TERRITORY OF ALASKA ex rel. OSCAR G. OLSON,

*Appellee.*

**On Appeal from the District Court for the Territory of Alaska, Division No. 1.**

## BRIEF FOR APPELLANTS.

---

### THE PLEADINGS.

In this case there is no Bill of Exceptions and the matters at issue all arise on the pleadings and all the pertinent facts are admitted.

Appellee, plaintiff below, brings this action against the Appellants, the defendants below, to obtain peremptory Writ of Mandamus ordering the defendants

to pay into the Treasury of the Territory of Alaska the sum of $350,000.00 which had been appropriated to the defendants by the Alaska Legislature for the purpose of setting up a revolving fund for the payment of veterans' bonuses and making loans to veterans under the provisions of Chapter 27, Session Laws of Alaska, 1946.

The appellants, defendants below, answered plaintiff's complaint and petition for the Writ; plaintiff filed a reply and the case was heard before the Court, and on August 28, 1947, the Court entered an order directing the issuance of the Peremptory Writ prayed for, and the Writ was immediately issued on the same day. The Court made no Findings or Conclusions of Law. Appellants, defendants below, filed exceptions to the order and the appeal follows:

## STATEMENT OF FACTS AND ISSUES.

There is no dispute as to the pertinent facts and the only issue involved is whether the Court below had the power to issue the peremptory writ of mandamus in this case. That is to say whether mandamus was a proper remedy. In April 1946, the Legislature of the Territory of Alaska passed an Act known as the Alaska World War II Veterans Act. (Chapter 27 Session Laws of Alaska, 1946.) This Act provides for loans and bonuses to veterans of World War II and it makes provision for a sales tax and a tax on services to raise the necessary funds. A Board is created by the Act known as the Alaska World War II Veterans Board, and provision is made for the appointment of an executive officer of the Board.

In order that the Board might function immediately and since no funds would be received from the tax imposed, for a period of several months, an appropriation was made by the Legislature and this was done by means of Section 5 of the Act which reads as follows:

> "Section 5. Appropriation. There is hereby appropriated the sum of three hundred fifty thousand dollars ($350,000.00) for deposit in the Alaska World War II Veterans' Revolving Fund to be used for the purpose of this Act, including expenses of administration; provided, however, that the Board shall pay back such sum to the Territorial Treasury as soon as revenues collected through the tax imposed by this Act will permit, but not later than four years after the effective date hereof."

The petition of plaintiff below sets forth in paragraph 5 that the revenues collected through the tax imposed by the Act amounted to, at the time the suit was filed, one and three quarter million dollars, and that the anticipated revenues to be collected for the September 1947 quarter and payable in October will equal approximately $300,000.00 so that revenues collected through the tax now permit the repayment by the Board of the original appropriation of $350,000.00. (Trans. p. 3.)

Then it is alleged in the petition that a demand was made upon the Board to repay to the Territorial Treasury, the initial appropriation on installment basis and that the Board had refused to make payments. (Trans. p. 4.)

It is then set forth in the petition that a serious financial shortage exists and that the Territory requires repayment of the initial appropriation and that the refusal on the part of the Board to make repayment is arbitrary and unreasonable and amounts to an abuse of authority contrary to law, etc. (Trans. p. 4.)

The defendants' answer denied that the revenues collected through the veterans tax permitted repayment of the sum of $350,000.00 by the Board to the general treasury or any portion thereof. (Trans. pp. 6-7.)

The defendants below, appellants here, then set up an affirmative defense to plaintiff's complaint and petition for Writ of Mandamus. (Trans. pp. 7-14.)

This affirmative defense alleges:

First: The passage of the act known as the Alaska World War II Veterans Act.

Second: That the purpose of the Act as shown therein was to "partially discharge the obligations of the Territory of Alaska to those of its citizens who are serving or have served in the Army, Navy, Marine Corps, or Coast Guard during World War II."

Third: That the Act provides for the appointment of a Board and the Board is named.

Fourth: That the Act provided for the appointment of a Commissioner of Veterans Affairs.

Fifth: The purposes of the Act.

Sixth: That the Act took effect immediately upon its passage and approval, thereby setting up the Board and providing for the operation of the law immediately upon its passage and approval.

Seventh: That the Act levies a tax for the creation of the fund.

Eighth: The date the Act went into effect and the date when the first taxes were payable, and reference is made to Section 5 of the Act.

Ninth: That loans and bonuses have been paid to veterans since the date of the passage and approval of the Act and the setting up of the Board, etc.

Tenth: That there are between 6500 and 7000 veterans in Alaska and that many applications began to come into the Board as soon as its machinery was set up.

Eleventh: That the total sum of $1,851,012.35 had been paid into the veterans fund through taxes up to the date of the filing of the petition and that adding thereto the amount of the original appropriation of the Territory $350,000.00 and a small amount of interest collected, the total revenues coming into the hands of the Commissioner and the Board amounted to $2,227,232.01.

Twelfth: That the Board had expended $4937.34 in the purchase of equipment, it had advanced in loans and bonuses all remaining sums coming into its hands at the time the petition was

filed except the sum of $388,795.35, which was on hand at the date of the alternative Writ, or in other words that the Board had advanced to that date in loans and bonuses $1,741,044.98.

Thirteenth: That the Board had on hand 937 unpaid applications for bonuses totaling $348,-740.00, and 308 pending applications for loans none of which had yet been made and totalling $2,066,320.00, and that in addition thereto the Commissioner had received 226 inquiries for bonuses without formal applications and 66 inquiries regarding loans where no formal applications had as yet been made.

Fourteenth: That when the application was made to the Board to refund the initial appropriation to the Territory, the Board had declined to make repayment for the reason that on account of the small balance of funds on hand and the large number of applications for loans and bonuses in the judgment of the Board and in the light of the general purposes of the Act, which was to make loans and pay bonuses to veterans in partial discharge of the recognized and declared obligation of the Territory to veterans of World War II, the revenues collected through the tax imposed by the Act would not permit repayment at this time.

Fifteenth: That the revenues provided by taxation imposed by the Act were required to be used for two purposes—the first of which was to

make and guarantee loans and pay bonuses and the second of which was to repay the amount advanced by the Territory, within four years from the effective date of the Act.

Sixteenth: That the Act provided for the payment of loans and bonuses immediately upon passage and approval of the Act and the setting up of the administrative machinery, and for the repayment of the appropriation advanced by the Territory only when revenues collected through the tax would permit, provided it was repaid not later than four years after the effective date of the Act.

Seventeenth: That the Board interpreted the Act to mean that the time for repayment of the appropriation to the Territory is a matter left in the discretion of the Board and that the intent and purpose of the Act is that the veterans loans and bonuses should receive first consideration and repayment of the appropriation to the Territory second consideration, provided repayment was made within four years from the passage date of the Act.

The plaintiff below, appellee here, filed a reply admitting all the allegations contained in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the Appellee's affirmative answer. (Trans. p. 15.)

With reference to paragraph XIV the Appellee admits that the Board declined to make the payment of

the $350,000.00 to the Territorial Treasury but he denies the reasons set up therefor. (Trans. p. 15.)

With reference to the allegations contained in paragraph XV Appellee denies in effect that the interpretation placed upon the provisions of Section 5 of the Act by the Board is correct. (Trans. p. 15.)

With reference to paragraph XVI of the affirmative defense plaintiff appellee in effect denies that the interpretation placed upon the Act by the Board was correct. (Trans. p. 15.)

Referring to the allegations contained in paragraph XVII the Appellee again admits in effect that the Board made a decision with reference to repayment of the appropriation, but denies that the decision was a proper one. (Trans. pp. 15-16.)

The pleadings raised one issue and that is whether or not the provisions of Section 5 of Chapter 27 of the Laws of Alaska 1946 leave to the discretion of the Alaska World War II Veterans Board the decision of the matter as to when the revenues collected through the tax imposed by the Act will within the four year period, permit repayment to the Territorial Treasury of the initial appropriation of $350,000.00, or whether if the Board, being charged with the administration of this Act and the carrying out of the expressed intent and purpose of the Act can be required by a mandate of the Court to make repayment of the initial appropriation at any particular time. In other words is mandamus a remedy available to the plaintiff? (Trans. pp. 2-16.)

## BASIS OF JURISDICTION.

The District Court had jurisdiction of this case under the provisions of Section 1091 Compiled Laws of Alaska, 1933, Section 101, Title 28, U.S.C.A.

The Circuit Court of Appeals has jurisdiction to review the final judgment in this cause upon appeal under Section 225, Title 28 U.S.C.A. as amended.

---

## ARGUMENT AND AUTHORITIES.

Appellants adopt the full assignment of errors as their point relied on here.

There is only one assignment of error and that is that the order of the Court of August 28, 1947 directing the issuance of a peremptory Writ of Mandamus was contrary to law and without authority of law and that the peremptory Writ issued pursuant thereto is of no force or effect for the reason that mandamus is not the proper remedy and was not available to the plaintiff in this cause, and that the Court erred in making the order that the peremptory Writ of Mandamus should issue. This assignment is directed to the contention of Appellee that the District Court had the power to direct the Alaska World War II Veterans Board to make repayment to the Territorial Treasury, at any particular time, of the appropriation made to the Board to carry out the purposes of the Act.

We contend that the provisions of Section 5, Chapter 27, Session Laws of Alaska, 1946, making the ini-

tial appropriation of $350,000.00 to the Alaska World War II Veterans' revolving fund gives the Board the discretion and the right to say just when the revenues collected through the tax imposed by the Act will permit repayment to the Territorial Treasury so long as repayment is made at any time within four years from the effective date of the Act. The law does not say that this $350,000.00 shall be paid back from the first revenues received. If it did it would have been an idle thing to have made the appropriation. The Act does not say it shall be paid back when any particular sum shall have been collected or when 25% or 50% of the pending applications shall have been acted upon; it does not say that it shall be paid back whenever there happens to be a balance of more than $350,000.00 on hand in the fund regardless of the merit or status of the applicants who may already have applications in for more than that amount. It does not say that the appropriation shall be paid back at any particular time. It sets no limit on it except that it must be paid back within four years and it certainly leaves to the discretion of some person or some board or body to say when the revenues collected through the tax imposed will permit the repayment of the appropriation. If that had not been the intent of the law it would have been easy for the Legislature to have specified just what conditions must exist at the time when repayment should be due. The Legislature did not do that but left it entirely to the discretion of the Board. Mandamus will lie of course to compel a Board to act one way or the other when that duty is imposed upon it by law, but it will not direct it how to act.

In this case the plaintiff alleges in his petition that the Board has acted by refusing to make repayment. The Board admits this and sets up in the affirmative defense why it refused to make repayment, and we do not think it proper for a Court by Writ of Mandamus to substitute its judgment and discretion for that of the Board where the judgment and discretion have been so plainly committed to the Board.

The pleadings show that the Board had paid certain bonuses, it had made and guaranteed certain loans, it had before it at the time the petition was filed other applications for bonuses and loans in a far greater sum than those already acted upon and surely it was for the Board to say whether the revenues which it had collected at that date would safely permit the repayment of the initial appropriation to the Territory.

In considering this point we must bear in mind the purposes of the Act for the purpose and intent of the Legislature is one of the first considerations in interpretation of statutes. It is one of the cardinal principles that in the interpretation of statutes the intention of the Legislature is to be derived from a view of the whole and every part of the statute considered together in the light of the general purpose of the Act.

As was said in the case of *Federal Land Bank v. Howell,* 123 Fed. (2d), page 50:

> "When words, phrases, clauses, sentences, or provisions are not explicit, the intention is to be collected from the context, tenor, spirit, occasion and necessity of the law and the remedy in view."

Now let us see what was the purpose and intent of Chapter 27 Session Laws of Alaska 1946, and what duties were imposed upon the Board. We find that expressed in the first sentence of sub-division (a) of Section 2 of the Act.

> "(a) Membership: There is hereby created the Alaska World War II Veterans Board whose duty it shall be to carry out the purposes and provisions of this Act and thereby partially discharge the obligations of the Territory of Alaska to those of its citizens who are serving or have served in the Army, Navy, Marine Corps or Coast Guard during World War II."

Then again in sub-division (d) of Section 2 we find the duty imposed upon the Board to * * *

> "* * * formulate general policies which the Commissioner shall observe and follow; adopt rules and regulations which shall be binding upon the commissioner, members of the Board and all persons employed in the performance of their duty under this Act * * *"

Then by the same subdivision the Board is also given the power to * * *

> "adopt rules and regulations necessary for the conduct of its business and for the carrying out of the provisions of this Act, and make necessary rulings and regulations to maintain such standards * * *"

The Board is not only given the power to make rulings and regulations but it is also given the power under sub-division (e) of Section 2 to * * *

> "authorize the Commissioner, under such rules, regulations and policies as it may adopt, to make loans of the kind and character hereinafter set forth * * *"

in other words the Board is not bound down by any strict formula or any detailed provisions for its conduct and procedure, but it is given the power to *adopt policies* and certainly the Board must have the discretion in the furtherance of its policy to say whether it is going to treat all applicants alike so far as possible where qualifications are equal, and that it is not its policy to serve the first 20 or 25% of applicants who apply, and then turn over the sum of $350,000.00 to the Territorial Treasury and allow the remaining applicants, far greater in number, to wait for their bonuses and loans. That is apparently not the policy of the Board; and not being the policy it was certainly within the power and discretion of the Board to deny the application of the Territorial Treasury to pay back the $350,000.00 after only a little over a year of the operation of the Act when the law seems to plainly vest the discretion in the Board to make repayment when in its judgment, all things considered, the revenues will permit, so long as this is done within 4 years.

The veterans who have already received loans and bonuses constituted little more than 25% of the estimated total number of veterans in the Territory who are eligible for loans and bonuses, and at the time of the filing of the petition there were 937 unpaid appli-

cations pending for bonuses totaling $348,740.00; and 308 applications for loans not yet acted upon which totalled $2,066,320.00, and in addition thereto hundreds of inquiries for bonuses and loans without formal applications. Surely the Veterans Board was vested by the provisions of the Act with the power of determining when the revenues would permit the repayment of this appropriation, taking into consideration the amounts collected, the amounts paid out, the number of applications for loans and bonuses pending and the general prospects. They are surely given the discretion to determine whether, since the primary purpose of the act is to make loans and pay bonuses to veterans, those deserving ones who have been late with their applications and who had not already been served should not be entitled to receive as much consideration as some of those who had easier access to the Commissioner through reason of residence and who came in early with their applications. Alaska is a large Territory. Many deserving veterans live in remote parts of the Territory's 600,000 square miles and in the very nature of things those who live in the vicinity of Juneau where the Commissioner has his headquarters, are served first.

The Board is the one upon whom is imposed the duty of making repayment under the provisions of Section 5 of the Act and the Board is given discretion to determine just when this may safely be done; and we submit that the Board cannot be commanded by mandamus when and how or in what manner they are to exercise that discretion.

In the case of *Edmonds v. Board of Examiners—Optometry etc.* decided by this Court in 1939 and found in 106 Fed. (2d), page 904, we find as follows:

> "With respect to the power to issue writs of mandamus, the courts have frequently spoken. 'Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion * * *' Work v. Rives, 267 U.S. 175, 177. 'Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.' Wilbur v. United States, 281 U.S. 206, 218. See also: United States ex rel. Girard Co. v. Helvering, 301 U.S. 540, 543; Miguel v. McCarl, 291 U.S. 442, 451; Work v. McAlester, Etc. Co., 262 U.S. 200, 208; Alaska Smokless Coal Co. v. Lane, 250 U.S. 549, 555; Noble v. Union River Logging Railroad, 147 U.S. 165, 171; Redfield v. Windom, 137 U.S. 636, 644; United States ex rel. Dunlap v. Black, 128 U.S. 40, 48."

The law seems to be well settled on this point and it may be summed up in the language of the Supreme Court of the United States in the case of *United States, ex rel. Girard Tea Company v. Helvering,* 301 U.S., page 543 as follows:

> "Where the right of the petitioner is not clear, and the duty of the officer, performance of which is to be commanded, is not plainly defined and

peremptory, mandamus is not an appropriate remedy." (Citing many cases.)

Again in the case of *Wilbur v. United States, ex rel. Kadrie,* 281 U.S. page 218, the Supreme Court says:

> "The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly described as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly described but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

In the case of *United States v. Black,* 128 U.S. page 40, the Supreme Court of the United States uses the following language:

> "The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a

mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then if they refuse a mandamus may be issued to compel them.

Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the Relator and his decision was confirmed by the Secretary of the Interior as evidenced by his signature on the certificate. Whether if the law were properly before us for consideration we should be of the same opinion or of a different opinion is of no consequence to a decision in this case. We have no appellate power over the Commissioner and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts."

Again in the case of *Interstate Commerce Commission v. N. Y., N. H. & H. R. Co.* found in 287 U.S. page 202, we find this language in the decision:

"Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, it is regarded as involving the character or judgment or discretion (Wilbur vs. U. S. Supra), and mandamus is thereby excluded."

Even if the statute in this case which requires the veterans board to pay back to the Territory the initial appropriation of $350,000.00 were vague and indefinite and not clear, according to the decisions of the Courts

mandamus could not be used to require the Board to act at any particular time or in any particular manner. However, we think the language of Section 5 of Chapter 27 of the Session Laws of Alaska 1946 is not at all vague and we think it plainly confers upon the Board the discretion to say just when within the 4 year period allowed the revenues derived from taxation will permit the repayment of the initial appropriation. No time is specified. We think the general rule is stated in 59 C. J. Section 634 at page 1078 as follows:

> "A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time for the performance of a certain act which may as effectually be done at any other time is usually regarded as directory."

In the case of *Childers v. Brown,* 158 Pac., page 166, in dealing with a right of a debtor to claim an exemption of property levied upon under execution the Supreme Court of Oregon was called upon to interpret the phrase "as soon as" which is the phrase found in Section 5 of Chapter 27, Laws of Alaska, 1946, and we find the following in the decision of the Supreme Court in that case:

"A strict application of the language of the statute would require the debtor to assert his right of redemption 'at the time of the levy' or 'as soon' as the levy shall be known to him, but the words employed are softened and relieved of any undue severity when viewed in the light of the rule of liberal construction. While it is true that, as taught in Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 161, 41 Pac. 390, the right of exemption is a privilege, which it must be conceded can be waived by the consent of the debtor or by his failure to assert his rights (12 A. & E. Ency. Law (2nd Ed.) 191; 11 R. C. L. p. 539), nevertheless a failure to select exempted property at the exact time of a levy, even though the debtor is present, will not alone operate as a waiver because the debtor has a reasonable time after he knows of the levy to claim his exemption. If the words 'at the time of the levy' are given a strict construction, they would signify the exact moment of the levy, and would indicate 'simultaneousness,' as distinguished from 'subsequence,' and therefore, within this severe meaning, the debtor, if present at the time of the seizure, would lose his right of exemption, unless he asserted his claim at the very moment of the levy. When used in reference to time the word 'at' does not always mean the exact moment or day, but certainly in many and perhaps in most instances it expresses nearness, closeness, and proximity, and consequently may denote a reasonable time. 5 C. J. 1427. The words 'as soon as' likewise have a restricted and an unrestricted signification. The narrowed meaning would require the debtor to act the very moment he learns of the levy, while the broader interpretation would afford a reasonable time. Obeying

> the teaching of precedents and adopting the liberal, rather than the severe, meaning, the language of the statute permits the debtor, if he acts before sale, to assert his right of exemption within a reasonable time after the levy becomes known to him whether he was present or absent at the time of the seizure."

We shall not burden the Court with a reference to the many recent decisions of the Supreme Court of the United States and the Circuit Court of Appeals to the effect that the interpretation of a statute by a board or administrator appointed to administer it is to be given great weight and the administrator's interpretation is very persuasive with the Court. Here the Board interpreted Section 5 of the Veterans Act to mean that in the administration of the law with the hundreds of applications it had on hand and the great demand for funds and the necessity for carrying out the purpose of the Act so far as the funds would permit, the Board had the power to decide just at what time the revenues collected through taxation would permit it to refund the initial appropriation. The Board decided in the light of all the circumstances and conditions surrounding the administration of the Act and in endeavoring to carry out the expressed purpose of the Legislature in enacting the law that the time had not yet come when the revenues would permit a repayment of this appropriation.

Of course if the Board should wait four years and at the end of that time not have paid back the $350,000.00 mandamus would be a proper remedy, but that is not the case here. This mandamus action is brought

almost at the very outset of the Board's administration of the Act at a time when it had already paid out large sums in bonuses and advanced other large sums in loans and had on hand hundreds of applications which were just as meritorious and worthy of consideration as those already acted upon, and at a time before the Board was in possession of sufficient facts to determine just what would be the total requirements for carrying out the purpose of the act. Surely the Board was set up for the very purpose, among other things, of administering the funds, discharging the obligation of the Territory to the veterans, and carrying out the purposes of the Act as expressed by the Legislature and surely it is plain that the Act gave to the Board the discretion and the power to say when this initial appropriation could be safely and fairly repaid bearing in mind that the only limitation placed upon the Board was that it must be repaid within four years from the effective date of the Act.

We respectfully pray that the Order of the Trial Court be reversed and the petition of the plaintiff below be dismissed.

Dated, Juneau, Alaska,
November 12, 1947.

Respectfully submitted,
FAULKNER & BANFIELD,
H. L. FAULKNER,
NORMAN C. BANFIELD,
*Attorneys for Appellants.*